STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 28, 2008
v	No. 279308 Eaton Circuit Court
PETER RUSINS ALBERTINS, Defendant-Appellee.	LC No. 06-000329-AR

Before: Wilder, P.J., Saad, C.J. and Smolenski, J.

PER CURIAM.

The prosecutor charged defendant with operating a motor vehicle while intoxicated, MCL 257.625(1), and failing to stop at the scene of a property damage accident, MCL 257.618. In this interlocutory appeal, plaintiff appeals the circuit court's decision to reverse the district court's denial of defendant's motion to quash a warrant for a blood test and suppress evidence of defendant's blood alcohol content. For the reasons stated herein, we reverse and remand.

I. Facts

On the partially preprinted affidavit/warrant form used in this case, Eaton County Sheriff's Deputy Ryan Keast, the arresting officer, struck the provision in the form indicating that the driver was involved in an "OUIL" and wrote in "OUID." Keast also indicated on the form that the victims of the automobile accident had identified defendant as the driver of the vehicle that struck their car. Paragraph three of the affidavit/warrant states:

> I believe that the named driver is under the influence of liquor and/or controlled substances based on:
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> Albertins was talking slow and was not walking ballanced [sic]. I spoke with Albertins' girlfriend who stated Albertins was going through a divorce and was on multiple medications for depression. When Albertins was walking into the Jail he kept leaning to the right. I thought he was going to fall over.

The following statement was preprinted on the affidavit/warrant form in paragraph four: "The driver, currently in custody at the Eaton County Jail, has refused a chemical test after being

informed of his/her rights." After the magistrate issued the warrant, a phlebotomist at Hayes-Green-Beach hospital drew vials of defendant's blood. Defendant's blood alcohol concentration was .27 grams of alcohol per 100 milliliters of blood.

The district court denied defendant's motion to quash the warrant and suppress the evidence, reasoning in part as follows:

> The affidavit for the search warrant does not state that defendant was arrested for OUIL, but states that he was being investigated for OUID. The contents of the affidavit are appropriate to that investigation. [Defendant's girlfriend's] statements about defendant being on medication would only make sense if she were expressing concern that he was under the influence of those medications at that time. Her credibility is suggested by the fact that she was defendant's girlfriend.
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> Paragraph 3 of the affidavit states that the affiant "believe(s) that the named driver is under the influence of liquor and/or controlled substances". There is no common sense reason to suppress a test of blood or urine which indicated use of alcohol instead of another drug when the reasons for issuance of the warrant could have applied to operation under the influence of either alcohol or drugs and the form of the affidavit referred to both possibilities.

Defendant appealed this ruling to the Eaton Circuit Court, which reversed the district court's decision and granted defendant's motion. The circuit court reasoned:

> There's really two issues here today, whether or not the affidavit established probable cause, and secondly, whether or not paragraph three of the affidavit supported the warrants directed to take blood.
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> * * *
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> And this is a Fourth Amendment case. It's not an implied consent case which gives me some cause for concern because I don't know if [the district court] recognized that frankly.
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> But I think we have to look at the Fourth Amendment because we have a situation here where the defendant was under arrest for leaving the scene and not a drinking and driving offense. Apparently that was, he was lodged in on that charge apparently due to a directive from [the assistant prosecutor].
>
> So that makes paragraph four in my mind what we have to key in on here because we don't know to what degree the magistrate in issuing the search warrant relied on that paragraph.
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> * * *
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> The officer, when he filled out the affidavit, failed to indicate that Mr. Albertins was not under arrest for the triggering offense under the implied consent

> statute. The affidavit in my mind provides a, an inference, probably a strong inference, that Mr. Albertins was under the arrest, was under arrest for a drinking driving offense and he wasn't.

The circuit court then reversed the district court's order denying the motion to quash and suppressed the evidence.

II. Analysis

The prosecution says, and we agree, that the circuit court erred when it reversed the district court's order. A reviewing court should read the search warrant and underlying affidavits in a common-sense and realistic manner, and it should defer to the magistrate's determination that probable cause existed. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). This deference "requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Id.* (internal citations omitted).

The circuit court reversed the district court's order that denied defendant's motion to suppress evidence based on the conclusion that the police had erroneously obtained a sample of defendant's blood without satisfying the requirements of the implied consent statute, MCL 257.625c. However, Keast obtained a search warrant to draw defendant's blood. "By obtaining this warrant prior to extracting blood from defendant, authorities removed the issue of consent from this case and therefore removed any question of admissibility from the 'implied consent' statute." *People v Cords*, 75 Mich App 415, 421; 254 NW2d 911 (1977). Because the blood sample was obtained through a search warrant, and not pursuant to the implied consent statute, the implied consent statute "does not act to limit the evidentiary use to which these test results may be put." *Id.* See also *Manko v Root*, 190 Mich App 702, 704; 476 NW2d 776 (1991); *People v Snyder*, 181 Mich App 768, 770; 449 NW2d 703 (1989); *People v Hempstead*, 144 Mich App 348, 353; 375 NW2d 445 (1985).

Instead, this warrant is valid if it is based on sufficient information offered by the investigating officers to support an independent judgment that probable cause exists. *Cords*, *supra* at 423. Here, the magistrate properly issued the warrant if he based his decision on a finding that probable cause existed that defendant had been driving under the influence and that his blood contained evidence of his crime.

Here, the affidavit stated that defendant had been involved in an accident and left the scene, that Keast noticed that defendant was talking slowly and had difficulty walking, that defendant was leaning to the right as he walked to the jail and Keast thought that he might fall over, and that defendant's girlfriend, Patricia Carcone, told Keast that defendant had been taking medication for depression. Although defendant argues that there were innocent explanations for his behavior, "the preference for warrants . . . requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Russo, supra* at 603. A reasonably cautious person could have

found a substantial basis to support a finding of probable cause based on the observations and information that Keast obtained and included in the affidavit. Neither Keast nor the magistrate were required to eliminate other possible explanations for defendant's behavior before seeking or issuing the warrant.

Although defendant argues otherwise, the affidavit does not contain any false statements. The affidavit merely shows that defendant was arrested and that Keast was investigating whether defendant had been driving while under the influence of drugs. Additionally, defendant was read his chemical test rights and declined to take a Breathalyzer.[1] Further, although defendant claims that the statement in Keast's affidavit indicating that Carcone told Keast that defendant was "on multiple medications for depression" was misleading, this accusation amounts to an attack on Keast's credibility and is a matter best left to the district court. *People v Paille #2*, 383 Mich 621, 627; 178 NW2d 465 (1970).[2]

We reverse the circuit court's order that reversed the district court's ruling and affirm the district court's order that denied defendant's motion to quash the warrant and suppress the evidence. We remand to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski

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[1] The circuit court concluded that the affidavit created a "strong inference" that defendant had been arrested for drunk driving, thus implicating the implied consent statute. The circuit court erred, however, in considering what the magistrate may have inferred because "[r]eviewing courts may consider only those facts that were presented to the magistrate." *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995), overruled on other grounds *People v Hawkins*, 468 Mich 488 (2003).

[2] In any event, the statement contained in the affidavit was not inconsistent with Carcone's subsequent testimony. Carcone testified that she told Keast that defendant "had possibly been on medicated drugs—some medication." The plural "drugs" is not inconsistent with "multiple medications" as set forth in the affidavit. Further, the phrase "on multiple medications" does not necessarily imply that she told Keast that she knew defendant was under the influence of those medications at the time of the accident. The preposition "on" means, in part, "taking or using as a prescribed measure, cure, etc." *Random House Webster's College Dictionary* (1997). Thus, in context, the phrase can reasonably be understood to mean that Carcone knew that defendant had been prescribed and was using medications for depression. This was consistent with her testimony that she knew that defendant had taken medication before the day of the accident. Moreover, on cross-examination Carcone explained that she told Keast that defendant "could have been on medication." Her testimony is consistent with the district court's conclusion that her "statements about defendant being on medication would only make sense if she were expressing concern that he was under the influence of those medications at that time."